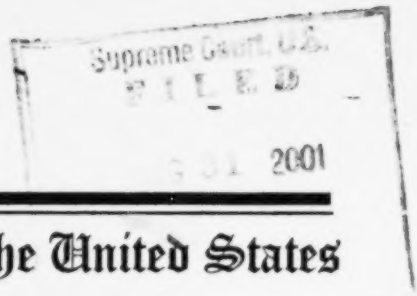

No. 01-236

In the Supreme Court of the United States

MICROSOFT CORPORATION, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

The court of appeals concluded that a district judge's contacts with the press, in violation of the Code of Conduct for United States Judges, warranted disqualification under 28 U.S.C. 455(a). The question presented is whether the unanimous en banc court properly exercised its remedial discretion, in accordance with *Liljeberg* v. *Health Services Acquisition Corp.*, 486 U.S. 847, 862 (1988), in refusing to vacate the district court's findings of fact and conclusions of law.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A139) is reported at 253 F.3d 34. The opinions of the district court are reported at 97 F. Supp. 2d 59 (final judgment), 87 F. Supp. 2d 30 (conclusions of law), and 84 F. Supp. 2d 9 (findings of fact). Petitioner has not reproduced the district court's judgment, conclusions of law, and findings of fact in the appendix to the petition for a writ of certiorari, but they are reproduced in the appendix to a jurisdictional statement (J.S. App.) filed on July 26, 2000. See J.S. App. A1-A279, *Microsoft Corp.* v. *United States*, appeal denied, 530 U.S. 1301 (2000) (No. 00-139).

JURISDICTION

The court of appeals entered its judgment on June 28, 2001. Microsoft filed a petition for rehearing on July 18, 2001, which was denied on August 2, 2001 (Pet. App.

A140). The petition for a writ of certiorari was filed on August 7, 2001. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISION AND CANONS INVOLVED

Section 455(a) of Title 28 of the United States Code provides: "Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned."

Canon 2A of the Code of Conduct for United States Judges states that "[a] judge should respect and comply with the law and should act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary." 175 F.R.D. 363, 365 (1998).

Canon 3A(4) of the Code of Conduct for United States Judges provides that a judge should "neither initiate nor consider *ex parte* communications on the merits * * * of a pending or impending proceeding." 175 F.R.D. at 367.

Canon 3A(6) of the Code of Conduct for United States Judges provides: "A judge should avoid public comment on the merits of a pending or impending action, requiring similar restraint by court personnel subject to the judge's direction and control." 175 F.R.D. at 367.

STATEMENT

Microsoft Corporation seeks review of a unanimous en banc judgment of the court of appeals that largely affirmed a district court judgment holding that Microsoft violated the Sherman Act, 15 U.S.C. 1 *et seq.*, but remanded the case for redetermination of remaining liability issues and the appropriate remedy for Microsoft's violations of the antitrust laws. Among its

rulings, the court of appeals concluded that the district judge's public statements and contacts with the press, in violation of the Code of Conduct for United States Judges, warranted disqualification under 28 U.S.C. 455(a). Microsoft limits its petition for review to whether the en banc court properly determined the appropriate remedy for violation of Section 455(a).

1. On May 18, 1998, the United States filed a civil complaint alleging that Microsoft had engaged in an anticompetitive course of conduct in violation of Sections 1 and 2 of the Sherman Act, 15 U.S.C. 1, 2. At Microsoft's request, the case was consolidated with a similar action brought by numerous States and the District of Columbia. The United States and the States (collectively, the government) jointly presented the case in a 76-day bench trial that began on October 19, 1998, and ended on June 24, 1999. On November 5, 1999, the court entered 412 findings of fact. On April 3, 2000, after the parties unsuccessfully attempted to settle the suit through mediation, the district court entered its conclusions of law. On June 7, 2000, after further proceedings on remedy, the district court entered its final judgment. See Pet. App. A6, A8-A11; see also J.S. App. A1-A43 (conclusions of law); *id.* at A46-A246 (findings of fact); *id.* at A247-A279 (memorandum, order, and final judgment).

On the central issue in the case, the district court ruled that Microsoft had successfully engaged in a series of anticompetitive acts to protect and maintain its personal computer (PC) operating system monopoly, in violation of Section 2 of the Sherman Act. See Pet. App. A10; J.S. App. A3-A21. The court also ruled that Microsoft had attempted to monopolize the internet Web browser market, in violation of Section 2, and had tied its Web browser, Internet Explorer, to its Win-

dows operating system, in violation of Section 1. See Pet. App. A10; J.S. App. A21-A33. The district court rejected the government's claim that Microsoft's exclusive dealing contracts violated Section 1 of the Sherman Act. See Pet. App. A10; J.S. App. A34-A39. To remedy the violations, the court ordered Microsoft to submit a plan to reorganize itself into two separate firms and to comply with transitional injunctive provisions. See Pet. App. A11; J.S. App. A253-A279.

Microsoft filed notices of appeal, and the court of appeals, sua sponte, ordered that any proceedings before it would be heard en banc. Pet. App. A11; J.S. App. A280-A283, A311-A312. The district court certified the case for direct appeal to this Court pursuant to the Expediting Act of 1903, as amended, 15 U.S.C. 29(b), and stayed its judgment pending completion of the appellate process. See Pet. App. A11; J.S. App. A284-A285. This Court declined to accept the appeal and remanded the case to the court of appeals for proceedings on the appeal. *Microsoft Corp.* v. *United States*, 530 U.S. 1301 (2000).[1]

2. After extensive briefing and two days of oral argument, the en banc court of appeals issued a unanimous and comprehensive decision affirming in part, reversing in part, and remanding in part for proceedings before a new district judge. Pet. App. A1-A139.

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[1] Although the government disagreed with the legal standard that the district court applied to the exclusive dealing claim under Section 1, it did not appeal that ruling because the court, as part of its Section 2 remedy, effectively ordered Microsoft to terminate the practices alleged to be unlawful in that Section 1 claim. See U.S. Br. in Response to J.S. 11 n.9.

The court of appeals affirmed the district court's central ruling that Microsoft violated Section 2 of the Sherman Act by engaging in an unlawful course of conduct to maintain its monopoly of the market for Intel-compatible PC operating systems. Pet. App. A15-A69. With minor exceptions, the court agreed with the district court's findings and conclusions that Microsoft's restrictions on original equipment manufacturers; its bundling of Internet Explorer into Windows; its dealings with internet access providers, independent software vendors, and Apple Computer; and its efforts to contain and to subvert Java technologies that threatened Microsoft's operating system monopoly, all served unlawfully to maintain the Windows monopoly. *Id.* at A32-A65. The court also rejected Microsoft's procedural challenges to the trial court proceedings, finding the court's actions "comfortably within the bounds of its broad discretion to conduct trials as it sees fit." *Id.* at A101, A106-A107.

The court reversed, however, the district court's determination that Microsoft had attempted to monopolize the Web browser market in violation of Section 2. Pet. App. A69-A77. The court also vacated the district court's judgment on the Section 1 tying claim and remanded that claim to the district court for reconsideration under the rule of reason. *Id.* at A77-A101. In light of those dispositions and its finding that an evidentiary hearing on remedy was necessary, the court vacated the final judgment and remanded the case to the district court for further proceedings. *Id.* at A107-A118.

The court of appeals also concluded that the district judge's contacts with the press violated the Code of Conduct for United States Judges and warranted disqualification under 28 U.S.C. 455(a). Pet. App. A118-

A134. The court discerned no actual bias on the part of the trial judge, but concluded that the appearance of partiality required, as a remedy for the violation, the judge's disqualification not only prospectively, but also retroactively to the date of entry of the final judgment. *Id.* at A130-A134.

3. Microsoft's petition for a writ of certiorari is specifically directed to the question whether the court of appeals properly determined the appropriate remedy for the judge's failure to disqualify himself under Section 455(a). See Pet. i. The court of appeals gave detailed consideration to that issue, devoting an hour of oral argument and twenty pages of its 125-page opinion to the topic of judicial misconduct. Pet. App. A118-A139. The court described at length the published accounts of the judge's contacts with news media, which came to light after the final judgment was entered. See *id.* at A119-A126. Because neither party had requested an evidentiary hearing on the matter, the judge's alleged statements were not part of the record. *Id.* at A120-A122. Nevertheless, the government did not dispute the news articles, and the court therefore "assume[d] the truth of the press accounts" that the judge had granted interviews while the case was pending and made the statements attributed to him. *Id.* at A121.[2]

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[2] The published press accounts indicate that all of the judge's discussions of the case with reporters occurred after conclusion of the trial, which ended on June 24, 1999. Although the exact number and dates of the press interviews remain unknown, it appears that all but two occurred after the judge entered the findings of fact on November 5, 1999. The first consisted of an interview in late September 1999, in which the judge reportedly told *New York Times* reporters that he would deliver his findings of fact and conclusions of law separately in order to induce the two sides to settle.

The court of appeals noted that the district judge's reported statements to the press describe the judge's impressions of Microsoft's conduct at trial, "with particular emphasis on what he regarded as the company's prevarication, hubris, and impenitence." Pet. App. A122. The judge apparently revealed his "after-the-fact credibility assessments" of Microsoft's witnesses. *Id.* at A123. For example, the judge reportedly stated that "Bill Gates' 'testimony is inherently without credibility,'" that Microsoft witnesses "were telling me things I just flatly could not credit," and "[i]f someone lies to you once, how much else can you credit as the truth?" *Ibid.* He also reportedly denounced Microsoft's executives in strong terms as arrogant and intransigent, *id.* at A123-A125, and "secretly divulged to reporters his views on the remedy for Microsoft's antitrust violations," *id.* at A125.

The court of appeals concluded that the judge's conversations with the press violated the Code of Conduct for United States Judges. Pet. App. A126-A130. The court pointed specifically to Canon 3A(6), which states that a judge should avoid public comment "on the merits of a pending or impending action," *id.* at A126-A128, Canon 3(A)(4), which states that a judge should "neither initiate nor consider ex parte communications on the merits, or procedures affecting the merits," *id.* at

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The judge "didn't say how he would rule," but he did indicate that "he had a problem with a central part of Microsoft's defense—the decision to integrate a Web browser with Windows." Joel Brinkley & Steve Lohr, *U.S. v. Microsoft* 263 (2001); Pet. App. A122. In the second reported instance, the judge discussed the case with reporter Ken Auletta on October 6, 1999, but what was said is unknown. Ken Auletta, *World War 3.0*, at 405 (2001). It appears that Mr. Auletta interviewed the judge on September 22, 1999, but that interview involved no discussion of the trial. *Ibid.*

A129, and Canon 2, which states that "a judge should avoid impropriety and the appearance of impropriety in all activities," *id.* at A129-A130. The court concluded that the judge's conduct in this case was sufficiently egregious to cause "a reasonable, informed observer to question the District Judge's impartiality," *id.* at A132, and therefore warranted disqualification, *id.* at A132-A134. See 28 U.S.C. 455(a) ("Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.").

The court of appeals determined the appropriate scope of disqualification by reference to this Court's decision in *Liljeberg* v. *Health Services Acquisition Corp.*, 486 U.S. 847, 862-864 (1988), which states that, in determining whether a judgment should be vacated for a violation of Section 455(a), it is appropriate to consider

> the risk of injustice to the parties in the particular case, the risk that the denial of relief will produce injustice in other cases, and the risk of undermining the public's confidence in the judicial process.

Id. at 864. Applying that standard to the facts of this case, the court of appeals concluded that the trial judge should be disqualified both prospectively and retroactively to the date of entry of the final judgment. Pet. App. A134-A135. The court refused Microsoft's request to set aside the district court's findings of fact and conclusions of law as a remedy for the judge's misconduct. *Ibid.* The court reasoned:

> This partially retroactive disqualification minimizes the risk of injustice to the parties and the damage to public confidence in the judicial process. Although the violations of the Code of Conduct and

> § 455(a) were serious, full retroactive disqualification is unnecessary. It would unduly penalize plaintiffs, who were innocent and unaware of the misconduct, and would have only slight marginal deterrent effect.
>
> Most important, full retroactive disqualification is unnecessary to protect Microsoft's right to an impartial adjudication. The District Judge's conduct destroyed the appearance of impartiality. Microsoft neither alleged nor demonstrated that it rose to the level of actual bias or prejudice. There is no reason to presume that everything the District Judge did is suspect. * * * Although Microsoft challenged very few of the findings as clearly erroneous, we have carefully reviewed the entire record and discern no basis to suppose that actual bias infected his factual findings.

Id. at A135-A136. The court also observed that "[t]he most serious judicial misconduct occurred near or during the remedial stage" and "[i]t is therefore commensurate that our remedy focus on that stage of the case." *Id.* at A136. The court accordingly vacated the final judgment, but declined to set aside the findings of fact or conclusions of law in toto. *Ibid.*

4. Shortly after the court of appeals issued its opinion, Microsoft sought rehearing on a technical question of fact—whether Microsoft "commingled" software code—unrelated to the issue of judicial misconduct. The court of appeals unanimously denied that petition on August 2, 2001. Pet. App. A140. Microsoft then filed its petition for a writ of certiorari and moved the court of appeals to stay its mandate pending disposition of the petition, characterizing the court of appeals' decision as creating a conflict with this Court's decision in *Liljeberg*

and with other lower court decisions. See, *e.g.*, Pet. 16-21. The government opposed the stay, pointing out, among other things, that Microsoft predicated its claim of a conflict on a misreading of the court of appeals' decision. The court of appeals unanimously denied Microsoft's motion, stating in relevant part:

> For the reasons stated in the [government's] response to the motion for stay, it appears that Microsoft has misconstrued our opinion, particularly with respect to what would have been required to justify vacating the district court's findings of fact and conclusions of law as a remedy for the violation of 28 U.S.C. § 455(a). We need not decide, however, whether Microsoft's objections constitute a "substantial question" likely to lead to Supreme Court review, because Microsoft has failed to demonstrate any substantial harm that would result from the reactivation of proceedings in the district court during the limited pendency of the certiorari petition.

App., *infra*, 1a-2a (order); see *id.* at 3a-12a (government's response). The court of appeals issued its mandate on August 24, 2001, and the district court promptly assigned a new district judge through that court's random selection process. In accordance with the court of appeals' decision, that judge will conduct proceedings on remand, including determination of the appropriate remedies for Microsoft's violations of the Sherman Act.[3]

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[3] The district court has directed the parties to file a joint status report by September 14, 2001, and to appear for a status conference on September 21, 2001. See 98-1232 (CKK) & 98-1233 (CKK) Order (D.D.C. Aug. 29, 2001).

ARGUMENT

Microsoft's petition for a writ of certiorari should be denied for three compelling reasons. First, the petition asks this Court to grant interlocutory review, contrary to this Court's policy against piecemeal appeals, in a case that Microsoft itself predicts may generate a second petition for certiorari at the conclusion of proceedings on remand. Pet. 15. Second, Microsoft's assertion that the court of appeals' decision conflicts with decisions of this Court and other courts of appeals rests squarely on a mischaracterization of the court of appeals' ruling, which simply applies the controlling authority, *Liljeberg* v. *Health Services Acquisition Corp.*, 486 U.S. 847 (1988), to the facts of this case. Third, the court of appeals' unanimous en banc decision properly applied *Liljeberg*, which specifically recognizes that courts of appeals have considerable discretion in resolving the factbound question of the proper remedy for specific instances of judicial misconduct. The court of appeals has provided a prompt and fair resolution of the issues on appeal, and the proceedings on remand should now go forward without further delay.

1. Microsoft seeks immediate review of a judgment that Microsoft itself acknowledges is plainly interlocutory. Pet. 15. The court of appeals' decision vacated the district court's final judgment and directed the district court to conduct further proceedings on remand, consistent with the opinion, on both liability issues and the appropriate remedy. Pet. App. A6-A8. The interlocutory character of the case "of itself alone furnishe[s] sufficient ground for the denial" of Microsoft's petition. *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916); see also *Brotherhood of Locomotive Firemen* v. *Bangor & Aroostook R.R.*, 389 U.S. 327, 328

(1967) ("because the Court of Appeals remanded the case, it is not yet ripe for review by this Court"); *Virginia Military Inst.* v. *United States*, 508 U.S. 946 (1993) (Scalia, J., concurring) ("We generally await final judgment in the lower courts before exercising our certiorari jurisdiction."); Robert L. Stern et al., *Supreme Court Practice* § 4.18, at 196 (7th ed. 1993).[4]

Microsoft nevertheless argues that the specific issue of whether the court of appeals should have vacated the district court's findings of fact and conclusions of law—unlike other issues that the court of appeals decided—is "ripe for the Court's review." Pet. 15. But Microsoft offers no satisfactory explanation of why that is so. Granting review on that question now will not eliminate the prospect of future requests for this Court's review or obviate a remand, which currently is limited to a discrete set of issues. See Pet. App. A6-A8. Cf. *Larson* v. *Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 685 (1949) (reviewing interlocutory decision where resolution of jurisdictional issue could eliminate the need for trial). To the contrary, Microsoft itself foresees the possibility that it will petition for a writ of

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[4] The general policy against interlocutory appeals has particular force in government civil antitrust cases. From 1903 to 1974, the Expediting Act, 15 U.S.C. 29, precluded interlocutory appeals in such cases. See, *e.g.*, *Tidewater Oil Co.* v. *United States*, 409 U.S. 151, 165, 171 (1972); *United States* v. *FMC Corp.*, 84 S. Ct. 4, 7 (1963) (Goldberg, J., in chambers); *United States* v. *California Coop. Canneries*, 279 U.S. 553, 558 (1929). Amended in 1974, the Act continues not to provide for interlocutory direct appeals to this Court. 15 U.S.C. 29(b). And the Act now prohibits interlocutory appeals to courts of appeals under 28 U.S.C. 1292(b). See 15 U.S.C. 29(a). Thus, while Microsoft invokes jurisdiction under 28 U.S.C. 1254(1), the Expediting Act continues to signal caution in granting review of any interlocutory aspect of a government civil antitrust case.

certiorari, after completion of the proceedings on remand and any subsequent appeals, to review several other aspects of the decision below. Pet. 15. Thus, Microsoft's petition provides clear notice that granting certiorari now would likely lead to multiple, piecemeal requests for review—precisely the result that this Court's practice of denying interlocutory review is designed to avoid.

Microsoft also argues that the determination of the proper remedy for judicial misconduct is "fundamental to the further conduct of the case." Pet. 15 (citing Stern, *supra*, at 196). Microsoft does not say why. See *ibid.* The reason for its silence is clear: The court of appeals' determination of that issue is no more "fundamental" than the court of appeals' determinations of the appropriate standards of antitrust liability, which Microsoft characterizes as "important questions of federal antitrust law that may ultimately"—but do not currently—"warrant this Court's review." *Ibid.* See *ibid.* ("the interlocutory nature of the court of appeals' judgment militates against review of [the liability] issues by this Court now"). In either instance, it is appropriate to await a final judgment on remand before seeking review by this Court. See *Hamilton-Brown Shoe Co.*, 240 U.S. at 258 ("except in extraordinary cases, the writ is not issued until final decree").

Microsoft also fails to describe the full measure of the standard it invokes to justify interlocutory review. This Court does not simply inquire whether the issue is "fundamental to the further conduct of the case," Pet. 15 (citing Stern, *supra*, at 196), but rather whether "there is some *important and clear-cut issue of law* that is fundamental to the further conduct of the case *and that would otherwise qualify as a basis for certiorari.*" Stern, *supra*, at 196 (emphasis added). As ex-

plained below, the issue that Microsoft presents does not satisfy those further pre-conditions for interlocutory review.[5]

2. Microsoft argues, as its basis for certiorari, that "in holding that vacatur of the findings of fact and conclusions of law is inappropriate absent a showing of actual bias, the decision below conflicts with this Court's decision in *Liljeberg* v. *Health Services Acquisition Corp.*, 486 U.S. 847 (1988), the Tenth Circuit's decision in *United States* v. *Cooley*, 1 F.3d 985 (10th Cir. 1993), and the Ninth Circuit's decision in *Preston* v. *United States*, 923 F.2d 731 (9th Cir. 1991)." Pet. 17; see also Pet. 16, 20. Microsoft's claim of a conflict rests on a misreading of *Liljeberg*, the decision below, and the other cases that Microsoft cites. Those four decisions apply the same legal standard to four different factual situations.

a. This Court's decision in *Liljeberg* affirmed a court of appeals' decision that remedied a violation of 28 U.S.C. 455(a), discovered after the entry of final judgment, by ordering a new trial. See 486 U.S. at 849-850. The Court stated that "[t]here need not be a draconian remedy for every violation of § 455(a)." *Id.* at 862. Rather, the Court observed that "Congress has

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[5] In accepting Microsoft's concession that its potential challenges to antitrust liability are not ripe, we by no means suggest that those liability issues, which it sets out at Pet. 15, would qualify as a basis for certiorari at a later date. For example, Microsoft notes that it might seek review of "the court's ruling that provisions in Microsoft's license agreements with computer manufacturers that prohibit unauthorized alterations to Microsoft's copyrighted Windows operating system before it is distributed to users violate Section 2." *Ibid.* The unanimous en banc court observed that "Microsoft's primary copyright argument borders upon the frivolous." Pet. App. A38.

wisely delegated to the judiciary" the task of fashioning the remedy. *Ibid.* The Court specifically pointed out:

> In considering whether a remedy is appropriate, we do well to bear in mind that in many cases—and this is such an example—the Court of Appeals is in a better position to evaluate the significance of a violation than is this Court. Its judgment as to the proper remedy should thus be afforded our due consideration.

Ibid. The Court directed that "in determining whether a judgment should be vacated for a violation of §455(a), it is appropriate to consider the risk of injustice to the parties in the particular case, the risk that the denial of relief will produce injustice in other cases, and the risk of undermining the public's confidence in the judicial process." *Id.* at 864.

Microsoft recites the facts of *Liljeberg*, Pet. 17, but it overlooks this Court's reasoning in two important respects. First, Microsoft fails to mention that the Court, which affirmed the decision before it, explicitly recognized that the courts of appeals have considerable discretion, and are entitled to considerable deference, in fashioning an appropriate remedy for a violation of 28 U.S.C. 455(a). Compare Pet. 17-18, with *Liljeberg*, 486 U.S. at 862. Second, this Court did *not* "require[] that the case be retried," Pet. 18, but instead held that the court of appeals' "determination that a new trial is in order is well supported." 486 U.S. at 862. To be sure, the Court said that vacatur was "*an* appropriate remedy" in that case. *Id.* at 867 (emphasis added). But it did not say that any other remedy would have been *in*appropriate, either generally or in *Liljeberg* itself.

b. Microsoft's reading of the decision below is even more seriously flawed. As explained in the Statement

(at pp. 6-9), the court of appeals specifically invoked this Court's standard in *Liljeberg* and applied it, according to its express terms, to the facts in this case. See Pet. App. A131, A134-A136. Microsoft nevertheless repeatedly characterizes the court of appeals' decision as "holding that a showing of actual bias is necessary for disqualification," Pet. 20, even though the decision says nothing of the kind. Compare Pet. 16, 17, 20, with Pet. App. A134-A136.

The government pointed out to the court of appeals, in response to Microsoft's request for a stay of the mandate pending resolution of the petition for writ of certiorari, that Microsoft's petition rested on a mischaracterization of the court's ruling. See App., *infra*, 6a. The court, which had the benefit of Microsoft's reply to the government's response, took the extraordinary step of stating, in its order denying Microsoft's request for a stay, that:

> For the reasons stated in the [government's] response to the motion for stay, it appears that Microsoft has misconstrued our opinion, particularly with respect to what would have been required to justify vacating the district court's findings of fact and conclusions of law as a remedy for the violation of 28 U.S.C. § 455(a).

App., *infra*, 1a-2a. The court of appeals' express rejection of Microsoft's central premise for review —that the court required a showing of "actual bias" —establishes beyond doubt that Microsoft has no basis

for its claim that the court's decision conflicts with *Liljeberg*.[6]

Microsoft's characterization of the decision below overlooks that, even though the court expressly found no actual bias, Pet. App. A136, A138-A139, it nevertheless *did* disqualify the trial judge—both prospectively and retroactively—because of the appearance of bias. *Id.* at A134-A135, A136. Rather than holding that "actual bias" is a requirement for disqualification, the court quite properly treated the absence of actual bias as a factor guiding its discretion in choosing an appropriate remedy for the district judge's misconduct. The court ultimately decided, based on its thorough review of the record before it, that the remedy should not include vacating the findings of fact and the conclusions of law. *Id.* at A136.[7]

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[6] The relevant filings in the court of appeals are posted at the court of appeals website for *United States* v. *Microsoft Corp.*, No. 00-5212 (D.C. Cir.): http://ecfp.cadc.uscourts.gov.

[7] Microsoft alternatively characterizes the court of appeals as holding that the lack of actual bias was the "most important" reason it refused to vacate the findings of fact and conclusions of law. See Pet. 14 ("'Most important,' the court added, 'full retroactive disqualification is unnecessary' because Microsoft had not demonstrated 'actual bias.' (A136)."); Pet. 16 ("The court of appeals stated that the '[m]ost important' factor in its decision to limit the scope of disqualification to the remedy phase was the absence of actual bias. (A136)."). That characterization is also unsound. In conducting its analysis under the *Liljeberg* standard, the court stated: "Most important, full retroactive disqualification is unnecessary *to protect Microsoft's right to an impartial adjudication*." Pet. App. A136 (emphasis added). The court of appeals simply weighed the evidence and reasonably exercised its discretion. In so doing, it determined that the lack of actual bias counseled against total vacatur. *Ibid.* That, too, was an appropriate exercise of discretion. See *Liljeberg*, 486 U.S. at 868 (weighing "risk of unfairness" to parties from upholding prior judgment).

c. For the same reasons, there is no merit to Microsoft's claim that the court of appeals' decision conflicts with *Preston* v. *United States*, 923 F.2d 731 (9th Cir. 1991), or *United States* v. *Cooley*, 1 F.3d 985 (10th Cir. 1993). See Pet. 18-20. Each of those cases relies on *Liljeberg* as the controlling authority, and neither case purports to establish or apply a legal standard different from the standard applied by the court of appeals here.

In *Preston*, a wrongful death suit, the court of appeals found a violation of Section 455(a) because, when the litigation began, the district judge was "of counsel" to the law firm representing the decedent's employer. 923 F.2d at 734. It determined the district court erred in denying a pre-trial motion for disqualification.[8] *Id.* at 735. The court of appeals acknowledged that *Liljeberg* provided the controlling standard for determining the appropriate remedy. *Ibid.* It concluded—without explaining its reasoning—that "[t]here is no way * * * to purge the perception of partiality *in this case* other than to vacate the judgment and remand the case to the district court for retrial by a different judge." *Ibid.* (emphasis added).

In *Cooley*, the court reversed a criminal conviction because the judge had appeared on a "Nightline" television broadcast and stated that various abortion protesters are "breaking the law" by violating his earlier-issued injunction. 1 F.3d at 990-991. The court of appeals concluded that the judge's statements created an appearance of bias that resulted in a violation of

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[8] By contrast, the misconduct here did not implicate any pre-existing basis for doubting the judge's impartiality, but arose from the judge's reactions to the evidence presented in the case itself. See note 11, *infra*.

Section 455(a). *Id.* at 995.[9] The court of appeals acknowledged *Liljeberg*, but it devoted just one paragraph to the subject of remedying the Section 455(a) violation. It concluded, without explaining its reasoning, that it was "satisfied that the remedy *in this case* is to vacate the conviction and sentence" of each defendant. *Id.* at 998 (emphasis added). Like *Preston*, *Cooley* rests on a fact-specific application of *Liljeberg* and does not give rise to any conflict with the decision before this Court.

In *Preston* and *Cooley*, the individual courts of appeals determined an appropriate remedy for a violation of 28 U.S.C. 455(a) in light of the discretion that *Liljeberg* affords and the facts and circumstances of the particular case. Those decisions do not suggest a legal standard that—contrary to *Liljeberg*—would require complete vacatur in every case in which an appearance of bias was found. Furthermore, those decisions—which involve factual circumstances markedly different from the decision below—do not mandate what would be an appropriate remedy here. Microsoft has identified differences in result based on different facts and not a conflict among the courts over the correct legal standard. Those differences do not create a conflict of circuit court authority meriting this Court's review. Rather, they simply reflect that the courts of appeals are engaging in the case-specific analysis that

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[9] Petitioner is wrong in arguing that the judge's "comments themselves were unobjectionable." Pet. 18. In fact, the court of appeals held that the "words actually spoken" and the judge's "expressive conduct" "*[t]ogether* * * * unavoidably created the appearance that the judge had become an active participant in bringing law and order to bear on the protesters, rather than remaining as a detached adjudicator." 1 F.3d at 995 (emphasis added).

Liljeberg indicates is necessary to determine appropriate remedies for violations of 28 U.S.C. 455(a).

3. At bottom, there is no conflict between the court of appeals' decision in this case and *Liljeberg*, *Preston*, or *Cooley*. Microsoft is left to argue that the court below abused its discretion in determining an appropriate remedy for the judge's misconduct in this case. See Pet. 21-26. Microsoft's arguments present no issue warranting this Court's review. The court of appeals' unanimous, en banc exercise of its discretion, including its application of *Liljeberg* to the facts of this case, was considered, deliberate, thorough, and reasonable.

a. The court of appeals properly balanced the risk of injustice to the parties in this case. See Pet. App. A135-A136. The court's disqualification of the judge and vacatur of the final judgment was a stern response to the trial judge's conduct. That action also collaterally penalized the government, which was "innocent and unaware of the misconduct," *id.* at A135, by delaying remedial proceedings until a new judge becomes familiar with the case. The further step of vacating the findings of fact could impose far greater costs, that would fall directly on the public, particularly if the court determined on remand that a retrial were necessary. A retrial could cost additional millions of taxpayer dollars, consume judicial resources for months, inject renewed uncertainty into the market, and delay still further imposition of a remedy. The court of appeals properly considered those costs when fashioning appropriate relief. See *Liljeberg*, 486 U.S. at 868-869 (considering whether it would be "unfair to deprive the prevailing party of its judgment"); *United States* v. *Cerceda*, 172 F.3d 806, 814, 816 (11th Cir.) (en banc) (per curiam) (considering cost to government of retrial), cert. denied, 528 U.S. 985 (1999); *In re School Asbestos Litig.*, 977

F.2d 764, 787 (3d Cir. 1992) (complete vacatur "would entail enormous cost to the parties and to the judicial system with little corresponding gain"); *In re Allied-Signal Inc.*, 891 F.2d 974, 976 (1st Cir. 1989) (Breyer, J.) (refusing to order complete vacatur in complex mass tort litigation).[10]

Microsoft does not seriously dispute the district court's conclusion that "full retroactive disqualification is unnecessary to protect Microsoft's right to an impartial adjudication." Pet. App. A136. See Pet. 22-23. Microsoft argues only that, if it had known of the judge's press contacts, it would have sought disqualification. *Ibid.* There is neither allegation nor evidence that the judge's conduct "rose to the level of actual bias or prejudice." Pet. App. A135-A136, A138-A139. Indeed, Microsoft challenged almost none of the district court's findings. *Id.* at A136. The court of appeals nevertheless undertook the task of reviewing "the record with painstaking care and * * * discerned no evidence of actual bias." *Id.* at A136, A138-A139.[11]

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[10] Microsoft's suggestion that "vacatur of the findings of fact *may* result in *some* additional expense and trial proceedings," Pet. 26 (emphasis added), vastly understates the consequences of a retrial. The trial on liability took 76 court days over an eight-month period and involved 26 witnesses, the admission into evidence of depositions of 79 other witnesses, and 2733 exhibits. It cost millions of dollars for both sides. By contrast, the remand proceedings required by the decision below would entail a fraction of that time and expense.

[11] Despite Microsoft's tepid protest (Pet. 16 n.6, citing MS Br. 148, Reply Br. 75), the court of appeals was indeed correct in stating that Microsoft never squarely charged the trial court with actual bias. MS Br. 148 (judge's comments "compromis[ed] the appearance of impartiality"; Reply Br. 75 (judge's comments "created a similar appearance of partiality"). Microsoft now claims that some of the court's derogatory comments reflect "personal animus"

Microsoft claims further injustice because the judge concealed his interviews from the parties. Pet. 22. But, unlike the respondent in *Liljeberg*, see 486 U.S. at 867, Microsoft became aware of the misconduct and argued it as part and parcel of its direct appeal. The evidence of Microsoft's liability was clear enough that the court of appeals could unanimously affirm the core of the government's claims even against the backdrop of the judge's misconduct. See *Cerceda*, 172 F.3d at 813 n.10 ("the possibility of a significant risk of injustice is substantially reduced" when direct appeal addresses possible Section 455(a) violation); cf. *Liljeberg*, 486 U.S. at 868 (vigorous dissent by panel member had questioned liability, even before conduct leading to judge's disqualification came to light).

The court of appeals also properly considered the timing and content of the judge's comments. Those factors suggested no injustice to petitioner from limiting the extent of retroactive disqualification. The "most serious judicial misconduct occurred near or during the remedial stage." Pet. App. A136. Only two of the interviews in which the trial was discussed took place before entry of the findings of fact, they occurred at least three months after the trial ended, and the judge's reported statements during those interviews were restrained. See note 2, *supra*. Microsoft appears to take the rigid position that the remedy of disqualification must always be retroactive to the instant of any

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that might be a sufficient basis for showing actual bias. Pet. 16 n.6. But actual bias can rarely be grounded on conclusions that are based solely on witness testimony and evidence adduced at trial, even if those conclusions are that a party is dishonest, recalcitrant, unreliable, or not credible. See *Liteky* v. *United States*, 510 U.S. 540, 555 (1994); *United States* v. *Alcoa*, 148 F.2d 416, 433 (2d Cir. 1945) (L. Hand, J.).

violation, regardless of the consequences. Pet. 22. But that is just the sort of inflexibility that this Court eschewed in *Liljeberg*, 486 U.S. at 862. See *United States* v. *Jordan*, 49 F.3d 152, 158-159 & n.9 (5th Cir. 1995) (vacating sentence but not underlying conviction, even though appearance of bias was "unmistakable" and disqualifying conduct antedated trial); *Cerceda*, 172 F.3d at 812-817 (refusing to vacate sentences or underlying convictions, even though disqualifying conduct antedated trial).[12]

b. There is little risk that denial of Microsoft's request for complete vacatur will produce injustice in other cases. Microsoft claims prejudice because the findings of fact, reviewed for clear error, may now be used in other cases. Pet. 23, 24. But despite Microsoft's failure to challenge all but a few of the findings of fact, Pet. App. A18, A136, the court of appeals nevertheless scrutinized the record closely before reaching its conclusion, *id.* at A138-A139. There is no risk of injustice because there is no reason to suspect that the findings of fact were tainted. The court's findings were fair and thorough, virtually unchallenged by petitioner, "pain-

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[12] In any event, the court of appeals did not find that the September 1999 interview that Microsoft cites (Pet. 22), by itself, created an appearance of bias that violated Section 455(a) or that, if it did, a proper remedy would have included retroactive disqualification to that point in time. The court concluded that the judge's overall conduct created an appearance of partiality, but Microsoft has provided "no reason to presume that everything the District Judge did is suspect." Pet. App. A136. The court of appeals indicated it had "little doubt" that, if Microsoft had moved to disqualify the judge during the proceedings below, the motion would have been granted. *Id.* at A128-A129. But the court was referring to a motion based on the full extent of the judge's transgressions in this case, see *id.* at A128, not to one based simply on the September interview.

staking[ly]" scrutinized on appellate review, and ultimately affirmed. They may properly be used in other proceedings, in accordance with principles of collateral estoppel, if such use is otherwise justified. Concerns about adverse rulings affecting other litigation attend every defendant's decision whether to litigate a case to judgment and are not unique to this case.

c. The court of appeals' remedy sufficiently restores public confidence in the judicial process; further vacatur "would have only slight marginal deterrent effect." Pet. App. A135. Disqualification was by itself an "extraordinary" remedy for the appearance of bias based on remarks reflecting what the judge learned during the trial, rather than from an extrajudicial source. *Id.* at A133. The court of appeals clearly was troubled by the trial judge's misconduct and gave the issue its utmost consideration. Its reprimand was severe and its remedy was strong. The enormous media coverage of the court of appeals' decision insures that the public is aware of the court's sharp chastisement for the judge's misconduct. The public's confidence in the judicial process is not undermined by the court's conclusion that vacating the findings of fact and conclusions of law would not be appropriate.[13]

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[13] Petitioner refers repeatedly to comments made by judges of the court of appeals at oral argument (Pet. 16, 21, 24-25) as evidence of the threat to public confidence in the judicial process. Reliance on the statements of individual judges made during questioning at oral argument, rather than on the court's decision, is "inappropriate." See *American Bioscience, Inc.* v. *Thompson*, 141 F. Supp. 2d 88, 93 n.4 (D.D.C. 2001). The en banc court of appeals unanimously determined that prospective and partially retroactive disqualification of the judge was the proper remedy, expressing the full court's determination that the chosen remedy was suffi-

4. A final consideration bears on Microsoft's petition for writ of certiorari. One year ago, the United States urged this Court to note probable jurisdiction under the Expediting Act because "[t]he public interest requires prompt and final resolution of the issues on appeal, both so that effective remedies can be put in place to restore competitive conditions and protect consumers and so that computer and software industries can plan for the future." See U.S. Brief in Response to J.S. 13. The Court declined direct review and instead directed the case to the court of appeals. The court of appeals responded to the public interest with alacrity. Through extraordinary efforts, the en banc court promptly resolved the issues that Microsoft tendered for appeal through a cogent and comprehensive unanimous decision that provides clear guidance for the district court on remand. That court's action has admirably provided what the government sought in urging direct appeal and has eliminated the need for further review by this Court. The proceedings on remand should now go forward. There is no warrant for further delay.

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cient to address the risk of undermining the public's confidence in the judicial process.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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AUGUST 2001

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 00-5212
Consolidated with No. 00-5213

UNITED STATES OF AMERICA, APPELLEE

v.

MICROSOFT CORPORATION, APPELLANT

Filed On: Aug. 17, 2001

BEFORE: GINSBURG, Chief Judge; EDWARDS, WILLIAMS, SENTELLE, RANDOLPH, ROGERS, and TATEL, Circuit Judges

ORDER

Upon consideration of the motion to stay the mandate, the response thereto, and the reply, it is

ORDERED that the motion be denied. In order to obtain a stay of the mandate pending its petition for certiorari, Microsoft must show that the "petition would present a substantial question and that there is good cause for a stay." *See* Fed. R. App. P. 41(d)(2)(A); *see also* D.C. Cir. Rule 41(a)(2) (movant for stay of mandate must provide "facts showing good cause for the relief sought"). For the reasons stated in the appellees' response to the motion for stay, it appears that Microsoft has misconstrued our opinion, particularly with respect to what would have been required to justify vacating

the district court's findings of fact and conclusions of law as a remedy for the violation of 28 U.S.C. § 455(a). We need not decide, however, whether Microsoft's objections constitute a "substantial question" likely to lead to Supreme Court review, because Microsoft has failed to demonstrate any substantial harm that would result from the reactivation of proceedings in the district court during the limited pendency of the certiorari petition. *See Renegotiation Board v. Bannercraft Clothing Co.*, 415 U.S. 1, 24 (1974); *Virginia Petroleum Jobbers Ass'n v. Federal Power Commission*, 259 F.2d 921, 925 (D.C. Cir. 1958).

The Clerk is directed to issue the mandate seven days from the date of this order. *See* Fed. R. App. P. 41(b).

Per Curiam.

FOR THE COURT:
Mark J. Langer, Clerk

BY: Linda Jones

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 00-5212
Consolidated with No. 00-5213

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

MICROSOFT CORPORATION, DEFENDANT-APPELLANT

Argued Feb. 26 & 27, 2001
Decided June 28, 2001

APPELLEES' RESPONSE TO MICROSOFT'S MOTION FOR STAY OF THE MANDATE PENDING PETITION FOR WRIT OF CERTIORARI

Microsoft requests a stay of this Court's mandate pending disposition of its petition for certiorari. By its terms, Microsoft's petition seeks interlocutory review of a highly fact-based determination that the Supreme Court has said a court of appeals is in the best position to make. Under the circumstances, Microsoft has little prospect of obtaining certiorari review, let alone winning a reversal, of this Court's unanimous, en banc judgment. Moreover, there is no sense in which resumption of proceedings before the district court would injure Microsoft in any way. By contrast, granting a stay would further delay the public's remedy and contribute to uncertainty in the market. Microsoft

therefore has not met any of the requirements for a stay. Accordingly, this Court should deny Microsoft's request and issue its mandate immediately.

To merit a stay, Microsoft "must show that the certiorari petition would present a substantial question and that there is good cause for a stay." Fed. R. App. P. 41(d)(2)(A); D.C. Cir. R. 41(a)(2). More specifically, Microsoft must demonstrate:

> (1) a reasonable probability that four Justices would vote to grant certiorari; (2) a significant possibility that the Court would reverse the judgment below; and (3) a likelihood of irreparable harm, assuming the correctness of the applicant's position, if the judgment is not stayed.

Packwood v. Senate Select Comm. on Ethics, 510 U.S. 1319, 1319 (Rehnquist, Circuit Justice 1994); *South Park Indep. School Dist. v. United States*, 453 U.S. 1301, 1303 (Powell, Circuit Justice 1981). *See also* ROBERT L. STERN, ET AL., SUPREME COURT PRACTICE § 17.19, at 689 (7th ed. 1993) (lower courts apply same factors). Thus, Microsoft's claim that it may obtain a stay by demonstrating "either" certworthiness *or* irreparable injury (Mot. 3) is not only incorrect[1]—but

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[1] In *Books v. City of Elkhart*, 239 F.3d 826 (7th Cir. 2001) (Ripple, J., in chambers) (Mot. 3), the parties agreed that a stay ought to be granted. *Id.* at 828. And Microsoft overreads *Deering Milliken, Inc. v. FTC*, 647 F.2d 1124 (D.C. Cir. 1978) (Mot. 3). That case was decided prior to the 1994 amendment to Rule 41 that added the requirement that a stay motion "must show that the certiorari petition would present a substantial question *and* that there is good cause for a stay." Fed. R. App. P. 41(d)(2)(A) (emphasis added). Even without that requirement in the Rule, the *Deering* court did not say that only one of those elements was

also irrelevant, because Microsoft demonstrates neither. In addition, the balance of equities strongly favors denial of the stay.

1. This Court's judgment is interlocutory. That fact "of itself alone furnishe[s] sufficient ground for the denial" of Microsoft's petition for certiorari. *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916); *see also Brotherhood of Locomotive Firemen v. Bangor & Aroostook R.R. Co.*, 389 U.S. 327, 328 (1967) ("because the Court of Appeals remanded the case, it is not yet ripe for review by this Court"); *Virginia Military Inst. v. United States*, 508 U.S. 946 (1993) (Scalia, J., concurring) ("We generally await final judgment in the lower courts before exercising our certiorari jurisdiction"); STERN, ET AL. § 4.18, at 196.

Microsoft argues that, despite the judgment's interlocutory status, the question of the scope of the district judge's disqualification is ripe for Supreme Court review. Pet. 15. But Microsoft itself foreshadows the likelihood that it will later petition for certiorari to review other aspects of this Court's decision. Pet. 15. Thus, it virtually promises that a grant of certiorari now would lead to multiple, piecemeal appeals—precisely the result the Supreme Court policy disfavoring interlocutory appeals is designed to avoid. *Cf. Cobbledick v. United States*, 309 U.S. 323, 326 (1940).

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required, and it both found the issues presented to be substantial, 647 F.2d at 1128, and concluded that "the balance of the equities" favored continuing the existing stay of the district court's orders —which had the same effect as staying the mandate. *Id.* at 1129. *Cf. Lincoln Tel. & Tel. Co. v. FCC*, 659 F.2d 1092, 1110 (D.C. Cir. 1981) (per curiam).

The Supreme Court likely will avert that result by denying certiorari now.

2. This Court's decision was entirely consistent with Supreme Court authority and that of its sister circuits. Microsoft argues that this Court required a showing of actual bias to vacate the Findings of Fact and Conclusions of Law and that that requirement conflicts with Supreme Court authority and decisions of other circuits. But the claimed conflicts are based wholly on demonstrable misreadings of this Court's decision and the other decisions Microsoft cites.

a. Contrary to Microsoft's assertions, this Court did not require "a showing of actual bias to obtain disqualification under 28 U.S.C. § 455(a)." Mot. 6. Indeed, though the Court found no actual bias (Slip Op. 122), it nevertheless *did* disqualify the trial judge—both prospectively and retroactively—because of the appearance of bias. *Id.* at 121. Rather than holding that "actual bias" is a requirement for disqualification, the Court quite properly considered it as merely one factor in guiding its discretion as to the remedy for the district judge's violation of § 455(a). *Id.* at 122.

b. Next, Microsoft misreads *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847 (1988), in two ways. First, it studiously avoids the Supreme Court's key holding:

> [T]he Court of Appeals is in a better position to evaluate the significance of a violation [of § 455(a)] than is this Court. Its judgment as to the proper remedy should thus be afforded our due consideration.

Id. at 862. The statute "neither prescribes nor prohibits any particular remedy for a violation." *Id.* Second, and accordingly, the Supreme Court did *not* "require[] that a final judgment . . . be vacated and the case retried" (Mot. 4), but held merely that the court of appeals' "determination that a new trial is in order is well supported." 486 U.S. at 862.

Liljeberg does require a court of appeals to weigh three factors when fashioning a remedy for violations of § 455(a). *Id.* at 864. This Court did just that (Slip Op. 121-22), and in so doing, soundly exercised its discretion. The Court's prospective and partial retroactive disqualification, and vacation of the remedy order, was a stern response to serious misconduct. It also collaterally penalized plaintiffs, "who were innocent and unaware of the misconduct" *(id.* at 122), by delaying remedy proceedings until a new judge is assigned and becomes familiar with the case. There was no evidence that Microsoft's "right to an impartial adjudication" on liability was compromised, no allegation or evidence that the judge's conduct "rose to the level of actual bias or prejudice," and no suggestion that plaintiffs were aware before Microsoft of the judge's misconduct. *Id.* at 122. The Court also took upon itself—because Microsoft challenged almost none of the district court's findings *(id.)*—to review "the record with painstaking care and . . . discerned no evidence of actual bias." *Id.* at 124. This Court's unanimous, en banc exercise of its discretion was considered, deliberate, thorough, and reasonable. There is no reason to suppose the Supreme Court will disturb it, or even choose to review it.

c. Nothing in this Court's decision conflicts with *Preston v. United States*, 923 F.2d 731 (9th Cir. 1991), or *United States v. Cooley*, 1 F.3d 985 (10th Cir. 1993), contrary to Microsoft's contention (Mot. 2). Neither case even purports to establish or apply a legal standard that differs from the standard this Court applied. In *Preston*, the court of appeals found a violation of § 455(a) in a wrongful death suit because when the litigation began, the district judge was of counsel to the law firm representing the decedent's employer. 923 F.2d at 734. Thus, unlike here, the conduct giving rise to the § 455(a) violation occurred before the district judge even began his proceedings. In exercising its discretion under *Liljeberg*, the *Preston* court determined that "[t]here is no way . . . to purge the perception of partiality *in this case* other than to vacate the judgment and remand the case to the district court for retrial by a different judge." *Id.* at 735 (emphasis added). By contrast, here the misconduct arose from the judge's reaction to the evidence presented in the case itself and did not implicate any preexisting basis to doubt the judge's impartiality.

In *Cooley*, the court reversed a criminal conviction because the judge had appeared on a "Nightline" broadcast and stated that various abortion protesters are "breaking the law" by violating his earlier-issued injunction[.] 1 F.3d at 990-91. This was a violation of § 455(a). *Id.* at 995. As in *Preston*, the conduct creating the § 455(a) violation occurred before the defendants even appeared in district court. In remedying the § 455 violation, the court of appeals cited *Liljeberg* and summarily stated that it was "satisfied that the remedy *in this case* is to vacate the conviction and sentence" of each defendant. *Id.* at 998 (emphasis added).

Both *Preston* and *Cooley* thus reflect what the courts deciding them thought to be appropriate remedies in the exercise of their discretion, given the facts and circumstances of those two cases. Neither case suggests a legal standard that would require vacatur in every case where an appearance of bias was found, and nothing in either case bears upon what would be an appropriate remedy here. As this Court recognized (Slip Op. 121-22), there are other cases involving violations of § 455 in which courts have determined, as this Court did, that vacatur was not required. *See In re School Asbestos Litigation*, 977 F.2d 764, 787-88 (3d Cir. 1992); *In re Allied Signal Inc.*, 891 F.2d 974, 975-76 (1st Cir. 1989) (Breyer, J.). Microsoft's motion mentions neither of these decisions, nor the relevant decisions in *United States v. Cerceda*, 172 F.3d 806, 812-17 (11th Cir. 1999) (en banc) (per curiam) (refusing to vacate sentences or underlying convictions); or *United States v. Jordan*, 49 F.3d 152, 158-59 (5th Cir. 1995) (vacating sentence but not underlying conviction).

3. Microsoft makes no serious claim that issuance of the mandate now will cause it irreparable injury. *See* Mot. 6 (claiming vague "threat of severe and unnecessary injury"). This omission in itself justifies denial of a stay. *See Ruckelshaus v. Monsanto Co.*, 463 U.S. 1315, 1317 (Blackmun, Circuit Justice 1983). Nor could Microsoft demonstrate irreparable injury. Issuing the mandate would merely allow remand proceedings to begin. There is no pending remedial judgment or decree to enforce that would alter Microsoft's business while its petition for certiorari is considered, and its petition will almost certainly be resolved before any new remedial order is actually entered by the District Court. Thus, the only injury to Microsoft would be the

cost of participating in the remand proceedings, but "'[m]ere litigation expense, even substantial and unrecoupable cost, does not constitute irreparable injury.'" *Ticor Title Ins. Co. v. FTC*, 814 F.2d 731, 740 (D.C. Cir. 1987) (quoting *Renegotiation Bd. v. Bannercraft Clothing Co.*, 415 U.S. 1, 24 (1974)); *McSurely v. McClellan*, 697 F.2d 309, 317 n.13 (D.C. Cir. 1982).

4. Finally, "[i]t is ultimately necessary . . . 'to "balance the equities"—to explore the relative harms to applicant and respondent, as well as the interests of the public at large.'" *Barnes v. E-Systems, Inc.*, 501 U.S. 1301, 1304-05 (Scalia, Circuit Justice 1991) (internal citations omitted). Here, the balance of equities tilts decidedly in favor of appellees. Microsoft offers no equities in its favor (Mot. 6-7), no injury it will suffer from the resumption of proceedings. By contrast, granting the stay will further hurt the public interest in competition and create uncertainty in the market.

Microsoft has been found to have committed serious violations of Section 2 of the Sherman Act through conduct that began in 1995, yet those violations remain unremedied. This Court repeatedly emphasized that rapid technological change has occurred and continues to occur in this market. Slip Op. 10, 37, 61, 83. Microsoft and other market participants continue to develop and introduce new products. Indeed, Microsoft has announced that it will soon introduce Windows XP, the next generation of its monopoly operating system. Because of its monopoly position, Microsoft's products and conduct overhang the market. The sooner remedial proceedings begin, the sooner a resolution can be crafted to assure competitive conditions and give industry participants the certainty they need to plan or

commit resources efficiently. Until that remedy is in place, each day of delay contributes additional injury to the public interest in competition. *See California v. American Stores Co.*, 492 U.S. 1301, 1304 (O'Connor, Circuit Justice 1989) (staying merger in part because "lessening of competition 'is precisely the kind of irreparable injury that injunctive relief . . . was intended to prevent'") (citation omitted); *Marathon Oil Co. v. Mobil Corp.*, 669 F.2d 384, 385 (6th Cir. 1982) (denying stay where court's "prime concern is the preservation of some competition in this market"). Issuing the mandate now would end that delay so that a new trial judge can be assigned, become familiar with the record, meet with the parties, and issue a discovery and scheduling order to govern remand proceedings. Such actions could all occur while not imposing irreparable injury on Microsoft before the Supreme Court can act.

Microsoft's liability has already been adjudicated and affirmed. This Court should deny Microsoft's request for a stay so that remand proceedings before a new judge can begin now.

CONCLUSION

Microsoft's Motion For Stay Of The Mandate Pending Petition For Writ Of Certiorari should be denied.

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August 10, 2001